IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2831 OF 2006
IN
SUIT (LODGING) NO.2365 OF 2006

Entertainment Network India Ltd. ....Plaintiff
V/s.
Mr.Jonathan Brady ....Defendant

Mr.Ravi Kadam, Advocate General with Mr.Ashish Kamath i/b Mulla & Mulla & C.B. & C. for the Plaintiff.

Mr.Dinyar Madon, Senior Counsel with Mr.Vypak Desai, Mr.Vivek Kathapalia i/b Nishith Desai for the Defendant.

CORAM : S.J. VAZIFDAR, J.
DATED : 28TH AUGUST, 2006.

P.C. :

1. In this suit for enforcement of a negative covenant in a contract of employment the Plaintiff seeks an interim order restraining the Defendant from taking up employment or any office or engagement with or rendering consultancy or other services to any other company, entity or person in a business similar to or competing with that of the Plaintiff till 31.3.2007. The Plaintiff has also sought an order restraining the Defendant from using, disclosing or divulging the confidential information and trade secrets and knowledge relating to the Plaintiff's

business.

2. In the suit, the Plaintiff has sought a declaration that an agreement dated 1.12.2003 is valid and subsisting and that the resignation tendered by the Defendant by an e-mail dated 20.5.2006 and an SMS dated 1.8.2006 is illegal and not binding on the Plaintiff. The Plaintiff has also sought permanent injunctions in terms of the temporary injunctions sought in the Notice of Motion. In addition thereto, the Plaintiff has sought damages.

3. The Defendant initially joined the services of the Plaintiff as a Radio Jockey at a annual salary of Rs.3,36,000/- and certain other benefits. A detailed letter of appointment followed. By a letter dated 7.5.2003, the Defendant's salary was increased. By a letter dated 28.11.2003, the Defendant was offered the position of a Radio Jockey on contract basis at the salary of Rs.7,20,000/- per annum.

4. This brings me to the main agreement dated 1.12.2003 the provisions whereof fall for consideration. Clauses 1, 2(a), (j), (l), 5 and the opening part of clause 10 thereof read as under :-

"**1. Commencement and Duration :**

This Agreement shall be effective from 1st December 2003 and shall continue for a period of sixteen months, upto the midnight of 31st March 2005. This Agreement may be renewed at the end of the above period on such revised terms and conditions and for such further periods as may be mutually agreed to by the parties hereto.

2. Obligations of the Artiste :

(a) The Artiste unconditionally and irrevocably assures and consents to ENIL that during the continuance of this Agreement he shall not contract directly or indirectly provide any of the services enumerated in this Agreement with any other Company/firm/Organization conducting business which is similar to ENIL's business. The Artiste understands and accepts that exclusivity is an integral part of this Agreement.

(j) The Artiste shall not undertake any work, of any nature whatsoever that is directly or indirectly in conflict / competition with and/or detrimental to the interests of ENIL, as well as in conflict with the said programme(s) or affecting his commitments hereunder, during the validity of this Agreement, without the prior written consent of ENIL.

(l) The Artiste unconditionally agrees and undertakes that he shall not perform or offer his services to any of ENIL's competitors during the currency of this Agreement. The Artiste will also ensure that prior written sanction of the Programming Supervisor and the Station Head of ENIL is obtained before the Artiste offers his services to any person or institution. The Artiste will also ensure that there is no conflict of interest for ENIL and will also conduct himself appropriately so as to protect the interests and brand name of ENIL/Radio Mirchi.

5. (a) The Artiste agrees and acknowledges that during the course of the Artiste's

engagement with ENIL, the Artiste will become familiar and privy to confidential information and trade secrets of ENIL or those of its associates and/or related Companies. The Artiste is fully aware that his services will be of a distinct, unique and extraordinary value to ENIL and therefore confirms, assures and undertakes that he will maintain strict confidentiality in relation to the entire creative work done by him on the said Programme(s), till such time as the respective episodes have been broadcast on the air. However, it shall be mandatory for the Artiste to maintain complete secrecy after the first recording schedule and until such episode has been premiered for broadcast.

(b) The Artiste hereby unconditionally and irrevocably agrees that during the term of this contract and for a period of six months (6) from the date of termination of this contract for any reason whatsoever, the Artiste shall not directly or indirectly own, manage, control, participate in, consult with, render services for, or take up employment, with any person, NGO or business entity or engage in any business (whether on a full time basis or otherwise) that competes with the business activities of ENIL or its associates or related companies. For the purposes of this Clause the "business activities of the Company" shall mean radio broadcasting, event management and outdoor advertising.

(c) The Artiste also hereby further undertakes and agrees not to communicate, disclose, divulge or operate on his own or any third party’s account, any confidential information or knowledge, regarding any part or whole of the trade secrets, know-how, constituents of the business, strategic initiatives, IPS’s operating methods etc.which were transmitted to the Artiste or which the Artiste gained awareness of during the course of her association with ENIL as the same is privileged and confidential in nature.

(d) The Artiste hereby agrees and

> acknowledges that any failure to comply with the obligations set out in the aforesaid Clauses will result in significant loss and damage to the business of ENIL. In case the above obligations are not complied with, the Artiste will be liable to pay to ENIL liquidated damages, which ENIL at its sole discretion will estimate, this is without prejudice to any further legal action that ENIL may decide to take against the Artiste.
>
> **10. <u>Termination :</u>**
>
> This Agreement shall not be terminated, except for the following reasons only, provided that 30 days Notice, in writing by Registered A.D. or Hand Delivery is received at the addresses mentioned above."

. The agreement was to remain in force till 31.3.2005.

5. The Plaintiff's case is that the agreement was renewed only upto 31.3.2007. The Defendant's case is that the agreement came to an end on 31.3.2005 and in any event on 31.3.2006. Thereafter the matter was under negotiations between the parties. The further correspondence must therefore be examined in this background.

6. A letter dated 19.3.2004 addressed by the Plaintiff to the Defendant is not very clear. Both the counsel however agreed that not much turns on this letter.

7. By a letter dated 22.6.2005, the Plaintiff increased the Defendant's salary to Rs.90,000/- per month and expressly stated that all other terms and conditions of employment would remain unchanged.

8. This brings me to the Plaintiff's letter dated 13.2.2006 in respect whereof there is considerable dispute on more than one ground. The Plaintiff stated that the Defendant would be eligible for the next increment in April, 2007. Thus the Defendant's engagement with the Plaintiff continued upto 31.3.2007. Whether the continuation was by way of a renewal/fresh agreement or a modification of the agreement dated 1.12.2003 is an aspect I will advert to later. It is important to set out the letter in extenso.

> "Dear Jonathan,
>
> This has reference to your contract ending 31st March 2006. We are happy to extend you services in our organization for a further period of one year. Your contract will consequently end on 31st March 2007.
>
> You will be paid an all inclusive consideration of Rs.1,40,000/- per month (Rupees One Lakh Fourty Thousand per month only) towards your services, subject to deduction of such taxes as may be applicable.
>
> All other terms and conditions mentioned in your offer letter remain unchanged.

> Please confirm your acceptance of our offer by signing a copy of this letter and returning to us within three days of receipt of this letter.
>
> Thanking you,
>
> Yours sincerely,"

. The letter dated 13.2.2006 was admittedly not signed by the Defendant.

9. Mr.Madon contended that the Defendant had not received this letter.

. It is difficult to accept the Defendant's case that he had not received the letter dated 13.2.2006. By a letter dated 10.5.2006, the Plaintiff informed the Defendant that it had revised his monthly consideration with effect from 1.4.2006 from 1,40,000/- per month to Rs.1,63,800/- per month. The figure of Rs.1,40,000/- appears for the first time only in the letter dated 13.2.2006. The Defendant does not deny the receipt of the letter dated 10.5.2006. Nor does he deny the receipt of remuneration in accordance therewith. If he had not received the letter dated 13.2.2006, he would naturally have questioned the Plaintiff as to how and when his monthly agreed consideration for the year 2005-2006 was raised to Rs.1,40,000/-. He did not do

so. Prima-facie, at least at this stage therefore it is a reasonable inference that the letter dated 13.2.2006 was received by the Defendant.

10. It is also difficult at this stage to accept the Defendant's case that the letter dated 13.2.2006 had in fact not been accepted by the Defendant. It is true that, as stated by Mr.Madon, the Defendant had not accepted the letter dated 13.2.2006 by signing a copy thereof and returning it to the Plaintiff. However, as the learned Advocate General pointed out, the agreement had been acted upon and accepted by the Defendant at least by conduct. I am inclined to agree for more than one reason.

11. Firstly, the letter dated 10.5.2006 expressly states :

> "..... all other terms and conditions of your contract remained unchanged. You will be eligible for your next increment in April, 2007."

. If the Defendant had not accepted the letter dated 13.2.2006 and the terms and conditions contained therein, surely again he would have responded stating

that there was no question of the terms and conditions remaining unchanged the same not having been arrived at or finalized. He did not do so.

12. Further the Defendant continued working with the Plaintiff till 31st July, 2006 and received remuneration in accordance with the letter. The conclusion that the Defendant accepted the terms and conditions of the letter dated 13.2.2006 is irresistible.

13. Mr.Madon then submitted that though the Defendant continued working, he did so only pending finalization of the negotiations between the parties. In this regard Mr.Madon also relied upon an e-mail message dated 4.7.2006 addressed by the Defendant to the Plaintiff in which the Defendant highlighted certain points in a draft agreement which he did not accept. The Plaintiff replied to the same by its e-mail dated 5.7.2006.

14. This submission is not well founded either. As rightly submitted by the Advocate General, these two e-mail messages merely indicate that subsequent to the acceptance by the Defendant of the letter dated 13.2.2006, parties were negotiating certain changes.

It is common ground that these negotiations did not fructify. That however would not lead to the conclusion that the terms and conditions stated in the letter dated 13.2.2006 were not accepted. It certainly does not support Mr.Madon's contention that the letter dated 13.2.2006 and the terms and conditions contained therein had never been accepted by the Defendant. The record indicates that the negotiations were to alter the terms and conditions of the agreement contained in the letter dated 13.2.2006 and not that the negotiations pertained to the same, to wit the terms and conditions contained in the letter were not under negotiations.

15. In this regard, it is also pertinent to note that the Plaintiff in the said e-mail dated 5.7.2006 stated as under :-

> "2. The 60 : 40 sharing clause always and will continue to exist. It exists <u>in your current contract</u> and it exists as a company policy for all jocks." (emphasis supplied)

. Thus both the parties accepted the existence of a "current contract". The Defendant did not respond stating that there was no " current contract". He considered quite clearly and correctly that a

contract was in existence. The present stand is an afterthought. This is clear in fact even from the purported letter of termination which I come to next.

16. By an e-mail dated 20.5.2006 the Defendant stated :

> "I regret to inform you that i am hereby resigning from the post of Consultant/Radio Jockey from your esteemed organisation Radio Mirchi. After spending four years here, i personally think it's time to move on. My date of joining was 9th September 2002, and my employee code is 25000052. I wish to be relieved from service by the end of this month, so please treat the period untill then as my notice period."

. Before I deal with the validity of the e-mail dated 20.5.2006 as a purported termination of the contract, it is necessary to note that the same in fact supports the Plaintiff's case that the negotiations which ensued between the parties in respect of the contract which are already been arrived at as aforesaid by the letter dated 13.2.2006. The Defendant in fact after this letter continued working with the Plaintiff on the terms and conditions contained in the letter dated 13.2.2006. The two e-mail messages dates 4.7.2006 and 5.7.2006 relied up by Mr.Madon which I have referred to earlier were subsequent to this purported termination of 20.5.2006.

It is pertinent to note that in the e-mail dated 20.5.2006, the Defendant therefore expressed a wish "to be relieved from the services". If there was no contract between the parties, there would be no question of requesting the Plaintiff to relieve him from their services. More important is the fact that prior to the letter dated 20.5.2006, there is nothing to suggest that the negotiations were going on between the parties after the letter dated 13.2.2006.

17. The e-mail dated 20.5.2006 is not in accordance with the agreement. The notice given is of only ten days, as the Defendant was to be relieved from the services of the Plaintiff by the end of the month. I would however have ignored this aspect and at the highest considered the Defendant bound for a period of thirty days from 20.5.2006. The matter however does not rest there.

18. Admittedly, the e-mail dated 20.5.2006 was abandoned and not acted upon. The Defendant thereafter admittedly worked with the Plaintiff on the same terms and conditions. The e-mail was thereafter not made the basis of a termination of the agreement as I will demonstrate shortly.

19. In this view of the matter, it is not necessary for me to consider whether the e-mail dated 20.5.2006 conforms to the other requirements of clause 10 of the agreement which stipulates the reasons for which a termination notice may be served by either party.

20. On 31.7.2006 i.e. over a month after the e-mail dated 20.5.2006, the Plaintiff addressed a letter to the Defendant requesting him for copies of the letters dated 13.2.2006 and 10.5.2006 acknowledged by the Defendant. The Defendant however on 1.8.2006 sent the following short message service (SMS) from his mobile telephone to the Plaintiff:

> "Im in Jaipur, will get back and call u. as it looks now, will not be able to go on air Mirchi now. im informing u the moment ive gotten to know."

. The SMS certainly does not conform to and is not in accordance with the said agreement and in particular clause 10 thereof. It states no reason whatsoever for the termination. It does not even give the stipulated notice period of 30 days. Significantly there is no reference to the said e-mail dated 20.5.2006.

21. In the circumstances, the Plaintiff has made out more than just a strong prima-facie case establishing the confirmation and the existence of a contract contained in and evidenced by the letter dated 13.2.2006 read with the agreement (Exhibit "E"). The first purported termination namely the e-mail dated 20.5.2006 was not acted upon and was in fact abandoned. The second termination contained in the SMS is invalid.

22. There was no dispute regarding the necessity to enforce the confidentiality clause namely clause 5 of the agreement. It is not necessary therefore to deal with the same.

23. The only other point raised on behalf of the Defendant was the letter dated 13.2.2006 is in any event contrary to the terms and conditions and in particular clauses 8 and 13 of the agreement (Exhibit "E") which read as under :-

> "**8. <u>Amendment :</u>**
>
> Nothing contained herein shall be amended by the parties thereto except by mutual agreement on writing.
>
> **13. <u>Entire Agreement :</u>**
>
> This Agreement represents the entire agreement between the parties hereto in the

> subject matter thereof and supersedes and cancels all prior agreements, arrangements or understandings, whether written or oral, between the parties hereto. This Agreement may be assigned by ENIL to any other party/entity, group company, division etc. without referring to any other person or party. No part of this document may be amended without the prior written concurrence of both parties hereto."

. Mr.Madon submitted that the letter dated 13.2.2006 had admittedly not been signed by the Defendant. According to him, the letter dated 13.2.2006 constituted an amendment to the agreement dated 1.12.2003. Relying on prayer clause (a) of the plaint, he submitted that this was also the Plaintiff's case as well in prayer clause (a) viz. that the Plaintiff has sought a declaration that the agreement dated 1.12.2003 is subsisting, valid and binding upon the Defendant. The submission is not well founded.

24. Clauses 8 and 13 pertain to the amendment of the agreement while it is in subsistence. The letter dated does not constitute an amendment. It was a afresh agreement for a new period altogether.

25. Mr.Madon stated that the Defendant has already signed an agreement with another party. If he has done so it was at his peril. The Defendant cannot

act in breach of his contract and present the Plaintiff with a fait-accompli. If this were to be permitted it would render such negative covenants redundant.

26. In the circumstances, ad-interim order in terms of prayers (a) and (b). Prayer (b) however will be in terms of the said agreement (Exhibit "E" to the plaint) and in particular clause 5 thereof. The Plaintiff undertakes to pay the Defendant’s salary and give him all other benefits in accordance with the said agreement irrespective of his working or not for the Plaintiff in the first instance but subject to the orders in the Notice of Motion.

. It is clarified that this order will not prejudice the Defendant from terminating the agreement hereafter. Such termination if any, and any challenge thereto will naturally be decided on its own merits.

27. Notice of Motion is expedited and made returnable peremptorily on 3rd October, 2006.

. All parties to act on an ordinary copy of this order duly authenticated by the Associate / Personal Assistant of this Court.